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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Petition for Declaratory Ruling and
Rulemaking With Respect to Defining,
Predicting and Measuring "Grade B
Intensity" For Purposes of the
Satellite Home Viewer Act

RM No. 9345

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MOTION FOR RECONSIDERATION
ORDERING EXPEDITED PLEADING SCHEDULE

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Dated: September 1, 1998

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**MOTION FOR RECONSIDERATION
ORDERING EXPEDITED PLEADING SCHEDULE**

The National Association of Broadcasters ("NAB")¹ hereby requests that the Commission reconsider its precipitous and unprecedented sua sponti Order dated August 26, 1998 (DA 98-1710) providing for an expedited pleading schedule in the above-styled proceeding, and reinstate the pleading deadlines provided for in its rules. This reconsideration is requested because: 1) no adequate reason has been provided for taking the extraordinary steps of ordering an expedited pleading schedule; 2) the expedited pleading schedule further prejudices broadcasters who have already been injured by the illegal conduct of those on whose behalf the proceeding is being expedited; and 3) an intervening event, namely the unilateral and unconditional stipulation by broadcast plaintiffs in CBS, Inc., et al. v. PrimeTime 24 Joint Venture, No. 96-3650-CIV-Nesbitt (S.D. Fla.) (hereinafter "CBS, et al.") delaying implementation of those portions of a

¹ NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

preliminary injunction requiring the disconnect of networking programming services to existing subscribers from October 8, 1998, to January 1, 1999, obviates whatever perceived need there was to expedite the pleading cycle.

Background

On August 18, 1998, EchoStar Communications Corporation ("EchoStar") filed a "Petition for Declaratory Ruling and/or Rulemaking" ("Petition") seeking sweeping Commission action relating to redefining, predicting and measuring Grade B intensity for purposes of the Satellite Home Viewer Act ("Act"). The scope and complexity of EchoStar's 30-page request is reflected by the fact that it required one and a half pages of single-spaced type for EchoStar to summarize the request for relief it was seeking.

EchoStar's petition contained no request for expedited consideration. The Commission normally takes a month or more to place such petitions on public notice, yet, in this case, for some inexplicable reason, it took the Commission a scant six business days to review EchoStar's petition, place it on public notice, and to unilaterally decide, in the middle of summer vacation schedules and, with an intervening three day weekend, to require responsive pleadings by September 11, 1998, two weeks from the date the Commission placed the petition on public notice.²

² Public Notice, DA 98-1710 (August 26, 1998) (announcing responsive pleadings to EchoStar's petition due on September 11, 1998).

**No Adequate Explanation Has Been Provided For
Expediting The Pleading Schedule**

The Commission's Public Notice announcing the expedited pleading schedule provides an inadequate and unsatisfactory one sentence explanation for its action. It states that the action is being taken "in order to facilitate any expedited action in this proceeding that the Commission may decide to take with respect to this petition or the related petition filed by the National Rural Telecommunications Cooperative (RM 9335)." (Emphasis supplied.)

But as NAB explained³ in response to the NRTC petition, there is no justification for taking expedited action on the NRTC petition nor on EchoStar's petition. Both NRTC and EchoStar have known of the pendency of broadcaster actions to enforce the SHVA since early 1996. A motion seeking a national preliminary injunction has been pending since March 1997, and a magistrate judge's decision recommending a national injunction was released in July 1997. NRTC and EchoStar did nothing in response to these events except quietly to exacerbate the problem by continuing, with reckless abandon, to sign up new subscribers illegally. Now, having willfully and repeatedly violated broadcasters' copyrights for years and finally having been brought to task by the courts, the Commission appears inclined to legitimize the conduct of these scofflaws by honoring NRTC's request for expedited action,⁴ for no other reason than that the Commission "may decide to take action."

³ Preliminary Response of NAB to Emergency Petition for Rule Making Filed by the NRTC" filed July 17, 1998 at p. 8 and N.2 (hereinafter "NAB's Response").

⁴ EchoStar's petition makes no request for expedited action.

The Expedited Pleading Schedule Prejudices Broadcasters

The granting of the petition could have serious adverse consequences for the broadcasting industry. At the outset, there is a profound question as to whether the Commission even has the jurisdiction to entertain EchoStar's request. NAB believes it does not.⁵ As to substance, while EchoStar's proposals raise difficult and complex engineering questions, it is clear that its proposed "99-99-99" model, indoor measurement scheme, and antenna positioning schemes are designed to eviscerate the protections Congress clearly intended to provide broadcasters in the context of copyright law. EchoStar's petition provides no data, whatsoever, on what the practical effect of adopting its proposals might be. This is undoubtedly due, in part, to the fact that heretofore no reputable engineer has ever considered anything like EchoStar's proposals.

Even minimal fairness and due process dictate that broadcasters be provided adequate time to attempt to analyze EchoStar's radical proposals in the context of the extensive field testing that has actually been conducted during the course of on-going litigation.⁶ Nor should the Commission rush to judgment on granting these petitions without even the remotest clue as to what the impact of EchoStar's proposals might be. Given the extraordinarily adverse impact EchoStar's proposal could have on broadcasters' exclusive programming rights, and the copyright protection Congress has chosen to provide for those rights, it is unconscionable for the Commission to provide

⁵ See NAB's Response at 21.

⁶ Id. at 23.

broadcasters with little more than two weeks to respond. This unfairness is compounded by the fact that the two week period is at the height of vacation schedules, including Labor Day weekend, when key people necessary to evaluate EchoStar's proposals are unavailable.

Broadcasters' Action in Miami Voluntarily Delaying Enforcement of the Preliminary Injunction Obviates the Need For An Expedited Pleading Schedule

The only conceivable explanation for why the Commission has felt the necessity to expedite action on the EchoStar and NRTC petitions is its mistaken belief in the totally unsubstantiated, and totally false, claim that, if existing PrimeTime 24 customers are disconnected by October 8, 1998, as required by the preliminary injunction in Miami, millions of subscribers will be denied access to network programming. In fact, the vast majority of these subscribers, many of whom reside within the Grade A contour of local network affiliates, can now receive network programming from their local affiliates, or could easily do so with the mere installation of properly installed rooftop antennas.⁷

Even were the Commission to assume that some disruption of existing subscribers might have resulted from the Miami Court's order requiring disconnects by October 8th, an action taken by plaintiffs in that case last Thursday should lay any such concerns to rest.

⁷ NAB Response at 22-27, 32-33.

On August 27, 1998, plaintiffs in the Miami copyright infringement action voluntarily, unilaterally, and unconditionally agreed to delay enforcement of the provisions of the preliminary injunction granted in that case requiring subscribers that were illegally signed up after March 11, 1997, be disconnected by October 8. Plaintiffs stated they would not seek to enforce the injunction until January 1, 1999.

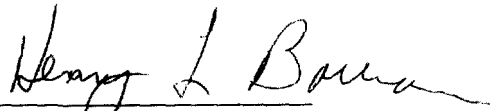
The reason plaintiffs took this action was to seek to preserve their reputation and the good will of their viewers by attempting to facilitate an organized and consumer friendly transition from the illegal distant network programming service being provided by NRTC and EchoStar through its supplier PrimeTime 24, to the provision of network programming by their local network affiliates, as Congress intended. The delay was necessitated by the careless, abrupt manner in which the subscribers of these companies, and others, were being notified of their impending disconnects. A copy of the plaintiff's filing in Miami delaying enforcement of the injunction with respect to disconnects is attached hereto.

Conclusion

For the reasons set forth herein, NAB submits that there is no reason to expedite the pleading schedule in this proceeding and that substantial prejudice will result from adhering to the September 11, 1998 date the Commission has set for comment.

Accordingly, we urge the Commission to reverse its decision and reinstate the normal 30-day period for filing responsive pleadings provided for in its rules.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Henry L. Baumann", written over a horizontal line.

Henry L. Baumann
Benjamin F.P. Ivins

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036


Dated: September 1, 1998

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration
Ordering Expedited Pleading Schedule was mailed this 1st day of September, 1998, via
First Class Mail, postage prepaid, to the following:

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Angela L. Barber

UNITED STATES DISTRICT COURT FILED BY _____ D.C.
SOUTHERN DISTRICT OF FLORIDA

98 AUG 27 PM 4: 28

CBS Broadcasting Inc., et al.,)

Plaintiffs,)

v.)

PrimeTime 24 Joint Venture,)

Defendant.)

CARLOS JENKE
CLERK U.S. DIST. CT.
S.D. OF FLA.-MIAMI

CIV-Nesbitt No. 96-3650

Magistrate Judge Johnson

**PLAINTIFFS' MOTION FOR IMPOSITION OF CONDITIONS
ON IMPLEMENTATION OF PRELIMINARY INJUNCTION BY PRIMETIME 24**

As the Court is aware, plaintiffs have consistently been concerned about the loss of goodwill that local network stations (as well as the networks themselves) suffer when PrimeTime signs up ineligible customers for its service, and later terminates the service. Experience has shown that viewers whose service is terminated frequently become angry at their local network station and threaten never to watch the station again. See, e.g., Report & Recommendation at 43-45; 6/2/97 Tr. at 71-72 (Farr); 6/2/97 Tr. at 152-53 (Schmidt); Declaration of William Sullivan (Tab 14 to Plfs.' Motion for Preliminary Injunction), at ¶¶ 9-10, Att. A; Declaration of Alrick Thedwell (Tab 16 to Plfs.' Motion for Preliminary Injunction), at ¶ 6 and Att. A; Subscriber Questionnaires (Plaintiffs' Trial Exhibit 508).

In the past, PrimeTime 24 has sought to inflame ineligible subscribers against their local stations when it terminates their network service. See, e.g. Declaration of Jerrell W. Birdwell (Tab 6 to Plfs.' Motion for Preliminary Injunction), at ¶ 8; Declaration of Sherry Burns

(Tab 7 to Plfs.' Motion for Preliminary Injunction), at ¶¶ 9-10, Att. A; Declaration of Ben Tucker (Tab 17 to Plfs.' Motion for Preliminary Injunction), at ¶¶ 10-13 and Att. A. It is likely that (absent restraint) PrimeTime 24 will continue to do so. Because PrimeTime 24 and its distributors lawlessly signed up huge numbers of ineligible subscribers while the preliminary injunction motion was pending, the threat to the goodwill of CBS and Fox and their affiliates as those subscribers are terminated is particularly acute.

To protect plaintiffs (and the public) from still further harm from PrimeTime 24's unlawful conduct, plaintiffs request that the Court impose the following conditions on PrimeTime 24's implementation of its duty under the preliminary injunction to terminate ineligible customers signed up after March 11, 1997:

1. Substantial advance disclosure of termination, with information about options for obtaining local stations. To make the transition from reliance on satellite delivery of network programming to local stations, PrimeTime 24's ineligible customers will need to obtain and install an over-the-air antenna or subscribe to a "lifeline" cable service that offers local broadcast stations. These steps take time. A customer who receives little or no notice that his or her satellite network service is about to be terminated may not be able to take these steps before the unlawful satellite service is ended. Viewers who are given little or no notice of this change in their television service may, as a result, have no access at all to network programming for a period of time. These viewers are likely to be upset and angry -- and to turn their anger on their local network stations and/or the national networks.

This problem is entirely preventable. First, to provide viewers sufficient time to arrange for other options, PrimeTime 24 should give its customers at least 45 days notice that it will be terminating their satellite network service. Second, PrimeTime 24 should give its customers truthful information about the options available to them to obtain network programming from local stations. A form of notice containing these disclosures is attached to the proposed order submitted with this motion.¹

Termination of unlawful service to large numbers of PrimeTime 24 subscribers is likely to place a heavy demand on the limited number of vendors capable of installing rooftop antennas. To alleviate this problem, and to protect their own goodwill in light of the large number of ineligible customers who must be terminated, plaintiffs hereby stipulate that until January 1, 1999, they will not seek contempt sanctions or otherwise seek to enforce the preliminary injunction with respect to delivery of CBS or Fox network programming to customers who received CBS or Fox network programming from PrimeTime 24 as of July 10, 1998.

2. Advance notification to local stations of customers to be terminated. Some stations may be willing (for their own reasons) to waive their rights with respect to certain viewers who are predicted by Longley-Rice to receive a signal of Grade B intensity. If stations know in advance which households are scheduled to have their satellite network service terminated, they will have the opportunity to decide in advance whether to waive their rights with respect to those households. Accordingly, plaintiffs request that PrimeTime 24 be required to

¹Contact with customers about the termination process may be initiated either by PrimeTime 24 or by its distributors. Under Rule 65(d), the order requested by plaintiffs would apply to both PrimeTime 24 and to its distributors who have actual notice of the order.

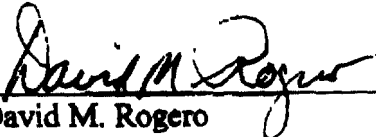
provide to each CBS and Fox station, at least 45 days before the date of termination, a list of all post-March 11, 1997 subscribers predicted by Longley-Rice to be capable of receiving a Grade B intensity signal from that station, and who have not been tested and found to be incapable of receiving a Grade B intensity signal. These stations may then, if they so choose, notify PrimeTime 24 that they do not object to satellite delivery of network programming to particular households or in particular areas.²

Conclusion

PrimeTime 24 has made much in its court filings of the disruption that will supposedly occur if it is required to comply with the Copyright Act. Plaintiffs submit that the steps described above will go a long ways towards minimizing any such disruption and ameliorating the harmful impact of PrimeTime 24's lawbreaking on its ineligible customers. Accordingly, plaintiffs offer the attached proposed order, which sets forth procedures for the implementation of the Court's preliminary injunction and requires the use of a particular notification letter to subscribers affected by the Court's orders.

²Viewers who are predicted by Longley-Rice to receive a signal of Grade B intensity from more than one CBS station (or more than one Fox station) would need to obtain waivers from each such station.

Respectfully submitted,


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Broadcasting, Inc., and Retlaw Enterprises, Inc.

August 27, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have, this 27th day of August, 1998, arranged for service of a true and correct copy of the Plaintiffs' Motion for Imposition of Conditions on Implementation of Preliminary Injunction by Primetime 24 Notice of Name Change upon counsel for the defendant as follows:

By Facsimile transmission and
U.S. Mail to:

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Critchlow & Spector, P.A.
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David M. Rogers

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CBS Broadcasting Inc., et al.,)

Plaintiffs,)

v.)

PrimeTime 24 Joint Venture,)

Defendant.)

CIV-Nesbitt No. 96-3650
Magistrate Judge Johnson

ORDER

It is hereby ORDERED that, in complying with the requirements of the July 10 Supplemental Order pertaining to subscribers who signed up for PrimeTime 24 after March 11, 1997, PrimeTime 24 shall take the following steps:

1. At least 45 days before terminating satellite delivery of CBS or Fox network programming to such a subscriber, PrimeTime 24 shall provide the subscriber with a notification in the form of Exhibit A hereto.

2. At least 45 days before terminating a subscriber that is predicted by Longley-Rice (in the manner specified in the Court's July 10 Orders) to receive a signal of Grade B intensity from a particular CBS or Fox network station, PrimeTime 24 shall provide the station with a list of all such subscribers. The CBS or Fox network stations may then, at their option, notify PrimeTime 24, with respect to particular subscribers, that the station does not object to continued satellite delivery of CBS or Fox network programming to those subscribers. This Paragraph 2 shall be applicable only with respect to CBS or Fox network stations for which plaintiffs have provided PrimeTime 24 a mailing address.

AUG-27-98 17:22 From:

3. PrimeTime 24 shall set forth the steps it has taken to comply with the above requirements in the compliance reports required by the July 10 Supplemental Order.

United States District Judge

Exhibit A

(Form of Subscriber Notification)

Dear _____:

As you may know, PrimeTime 24 is permitted to deliver ABC, CBS, Fox, and NBC programming only to a limited number of households, and not to everyone. To qualify to receive network programming by satellite from PrimeTime 24, a household must be unable to receive an over-the-air signal of a certain strength from local network stations through use of a rooftop antenna. PrimeTime 24 does not obtain the copyrights necessary to deliver network programming to any other households.

A federal judge has made a preliminary finding that PrimeTime 24 has not restricted its service in the manner required by federal law. Specifically, the Court has found that PrimeTime 24 has sold network programming to many customers who are likely to be able to receive their local network stations over the air.

Because of these findings, the Court has ordered PrimeTime 24 to change its practices for signing up new customers, and to terminate service to certain customers who appear to be ineligible to receive it. PrimeTime 24 has determined, using the procedures specified by the Court, that your household is likely to be able to receive a signal of Grade B intensity from a local [CBS] [Fox] station. Accordingly, PrimeTime 24 is required to terminate satellite delivery of [CBS] [Fox] programming to your household.

There are two options available to you to continue receiving network programming after PrimeTime 24 terminates distant network service to your home. *First*, many viewers can obtain local network stations through use of an over-the-air antenna. Local electronics dealers in your area can probably help you to choose, purchase, and install an over-the-air antenna, or to check on the functioning of an antenna that you already have. *Second*, you may wish to purchase a basic, or "lifeline" cable service that provides local broadcast stations. Your local cable company (or companies) can provide you with more information about this possibility.

To ensure that you will have sufficient time to make the transition to viewing your local network stations, PrimeTime 24 is providing this notice **45 days in advance** of the day your PrimeTime 24 service will be terminated. (That is, delivery of [CBS] [Fox] programming from PrimeTime 24 service is scheduled to be terminated on [DATE].) You will therefore want to make arrangements quickly to obtain local network stations so that your access to network programming will not be interrupted.

Very truly yours,